

FUNDING COMMITMENT REPORT  
Service Provider Name: Net56, Inc  
SPIN: 143025679  
Funding Year: 2009

Name of Billed Entity: ZION SCHOOL DISTRICT 6  
Billed Entity Address: 2200 BETHESDA BLVD  
Billed Entity City: ZION  
Billed Entity State: IL  
Billed Entity Zip Code: 60099-2352  
Billed Entity Number: 135356  
Contact Person's Name: Tony DeMonte  
Preferred Mode of Contact: EMAIL  
Contact Information: TDeMonte@zion.k12.il.us  
Form 471 Application Number: 690016  
Funding Request Number: 1890106  
Funding Status: Not Funded  
Category of Service: Internet Access  
Form 470 Application Number: 118750000711036  
Contract Number: T  
Billing Account Number: N/A  
Service Start Date: 07/01/2009  
Contract Expiration Date: 06/30/2010  
Number of Months Recurring Service Provided in Funding Year: 12  
Annual Pre-Discount Amount for Eligible Recurring Charges: \$120,000.00  
Annual Pre-Discount Amount for Eligible Non-Recurring Charges: \$0.00  
Pre-Discount Amount: \$120,000.00  
Applicant's Discount Percentage Approved by SLD: 89%  
Funding Commitment Decision: \$0.00 - Selective - Program Violation  
Funding Commitment Decision Explanation: This funding request is denied as a result of the program violations explained in the Further Explanation of Administrator's Funding Decision letter sent this date under separate cover.  
ECDL Date: 02/02/2010  
Wave Number: 038  
Last Allowable Date for Delivery and Installation for Non-Recurring Services: 09/30/2010

FUNDING COMMITMENT REPORT  
Service Provider Name: Net56, Inc  
SPIN: 143025679  
Funding Year: 2009

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Billed Entity Address: 2200 BETHESDA BLVD  
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Billed Entity State: IL  
Billed Entity Zip Code: 60099-2352  
Billed Entity Number: 135356  
Contact Person's Name: Tony DeMonte  
Preferred Mode of Contact: EMAIL  
Contact Information: TDeMonte@zion.k12.il.us  
Form 471 Application Number: 698016  
Funding Request Number: 1890232  
Funding Status: Not Funded  
Category of Service: Internet Access  
Form 470 Application Number: 118750000711036  
Contract Number: T  
Billing Account Number: N/A  
Service Start Date: 07/01/2009  
Contract Expiration Date: 06/30/2010  
Number of Months Recurring Service Provided in Funding Year: 12  
Annual Pre-Discount Amount for Eligible Recurring Charges: \$90,780.00  
Annual Pre-Discount Amount for Eligible Non-Recurring Charges: \$.00  
Pre-Discount Amount: \$90,780.00  
Applicant's Discount Percentage Approved by SLD: 89%  
Funding Commitment Decision: \$.00 - Selective - Program Violation  
Funding Commitment Decision Explanation: This funding request is denied as a result of the program violations explained in the Further Explanation of Administrator's  
Funding Decision letter sent this date under separate cover.

ECDL Date: 02/02/2010

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SPIN: 143025679  
Funding Year: 2009

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Billed Entity Address: 2200 BETHESDA BLVD  
Billed Entity City: ZION  
Billed Entity State: IL  
Billed Entity Zip Code: 60099-2352  
Billed Entity Number: 135356  
Contact Person's Name: Tony DeMonte  
Preferred Mode of Contact: EMAIL  
Contact Information: TDeMonte@zion.k12.il.us  
Form 471 Application Number: 690016  
Funding Request Number: 1890293  
Funding Status: Not Funded  
Category of Service: Internet Access  
Form 470 Application Number: 118750000711036  
Contract Number: T  
Billing Account Number: N/A  
Service Start Date: 07/01/2009  
Contract Expiration Date: 06/30/2010  
Number of Months Recurring Service Provided in Funding Year: 12  
Annual Pre-Discount Amount for Eligible Recurring Charges: \$65,580.00  
Annual Pre-Discount Amount for Eligible Non-Recurring Charges: \$.00  
Pre-Discount Amount: \$65,580.00  
Applicant's Discount Percentage Approved by SLD: 89%  
Funding Commitment Decision: \$.00 - Selective - Program Violation  
Funding Commitment Decision Explanation: This funding request is denied as a result of the program violations explained in the Further Explanation of Administrator's Funding Decision letter sent this date under separate cover.  
FCDL Date: 02/02/2010  
Wave Number: 038  
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FUNDING COMMITMENT REPORT  
Service Provider Name: Net56, Inc  
SPIN: 143025679  
Funding Year: 2009

Name of Billed Entity: ZION SCHOOL DISTRICT 6  
Billed Entity Address: 2200 BETHESDA BLVD  
Billed Entity City: ZION  
Billed Entity State: IL  
Billed Entity Zip Code: 60099-2352  
Billed Entity Number: 135356  
Contact Person's Name: Tony DeMonte  
Preferred Mode of Contact: EMAIL  
Contact Information: TDeMonte@zion.k12.il.us  
Form 471 Application Number: 890016  
Funding Request Number: 1890346  
Funding Status: Not Funded  
Category of Service: Internet Access  
Form 470 Application Number: 118750000711036  
Contract Number: T  
Billing Account Number: N/A  
Service Start Date: 07/01/2009  
Contract Expiration Date: 06/30/2010  
Number of Months Recurring Service Provided in Funding Year: 12  
Annual Pre-Discount Amount for Eligible Recurring Charges: \$60,000.00  
Annual Pre-Discount Amount for Eligible Non-Recurring Charges: \$.00  
Pre-Discount Amount: \$60,000.00  
Applicant's Discount Percentage Approved by SLD: 89%  
Funding Commitment Decision: \$.00 - Selective - Program Violation  
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Contact Person's Name: Tony DeMonte  
Preferred Mode of Contact: EMAIL  
Contact Information: TDeMonte@zion.k12.il.us  
Form 471 Application Number: 690016  
Funding Request Number: 1890373  
Funding Status: Not Funded  
Category of Service: Internet Access  
Form 470 Application Number: 118750000711036  
Contract Number: T  
Billing Account Number: N/A  
Service Start Date: 07/01/2009  
Contract Expiration Date: 06/30/2010  
Number of Months Recurring Service Provided in Funding Year: 12  
Annual Pre-Discount Amount for Eligible Recurring Charges: \$60,000.00  
Annual Pre-Discount Amount for Eligible Non-Recurring Charges: \$.00  
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# HINSHAW

& CULBERTSON LLP

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## LETTER OF APPEAL

September 8, 2011

Letter of Appeal  
Schools and Libraries Division - Correspondence Unit  
30 Lanidex Plaza West  
PO Box 685  
Parsippany, NJ 07054-0685

**Re: REQUEST FOR REVIEW. In The Matter of Notification of Improperly Disbursed Funds Recovery Letter. Funding Year 2005: July 1, 2005 - June 30, 2006. Form 471 Number 480458, Funding Request Number 1328142 and Funds to be recovered: \$167,280.00.**

Appeal of Commitment Adjustment Decision  
CC Docket No. 02-6; Docket No. 96-45  
Applicant Name: Zion Elementary School District 6  
Billed Entity Name: Zion Elementary School District 6  
Contact Persons: Anthony Ficarelli,  
Richard Kolodziej  
Hinshaw & Culbertson, LLP  
10 East Scranton Ave.  
Lake Bluff, Illinois 60044  
(P) 847-735-0107  
(F) 847-735-0309  
[aficarelli@hinshawlaw.com](mailto:aficarelli@hinshawlaw.com)  
[rkolodziej@hinshawlaw.com](mailto:rkolodziej@hinshawlaw.com)

Requesting Appeal From: Notification of Commitment Adjustment Letter, dated 7/12/11  
Billed Entity Number: 135356  
Funding Request Numbers: 1328142  
Form 471 Number: 480458  
Date of Notification of Commitment Adjustment Letter: 7/12/11  
Funds to be recovered: \$167,280.00

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To Whom It May Concern:

Zion Elementary School District 6, by their attorneys, Hinshaw & Culbertson, LLP, appeals the Notification of Commitment Adjustment letter dated July 12, 2011 for Funding Year 2005: July 1, 2005 - June 30, 2006.

**I. Summary Of Issues On Review.**

On July 12, 2011, Zion Elementary School District 6, (hereinafter District 6) was served with correspondence entitled: "Notification of Improperly Disbursed Funds Recovery Letter. Funding Year 2005: July 1, 005 - June 30, 2006." A copy of this correspondence was also sent to District 6's service provider at the time, Net56, Inc. (hereinafter, Net56). In total, USAC is seeking the return of \$167, 280.00, which it claims to have been improperly disbursed.

The allegations directed at District 6 are substantially different from the allegations directed towards the service provider, Net56. District 6 will address only those allegations which have been made against it and will allow Net56 to respond to the allegations directed to it. It should be noted, District 6 is currently involved in litigation with Net56 in the Circuit Court of Lake County. Included in this litigation is a request for Net56 to return nearly \$350,000 in BEAR reimbursements which have been improperly withheld. District 6 paid the full amount of their contract price, yet District 6 has never received all of the reimbursement for Funding Year 2005. To make the District pay an additional \$167,280.00 would result in the District being charged twice for the same services and would further hinder the underlying policy of E-Rate funding. A copy of this request for review has been forwarded to District 6's former provider, Net56.

USAC cites the following basis for their request for remand, each of which will be addressed in detail below, establishing that District 6 acted appropriately in every instance:

- 1) Funding was provided for DNS/DHCP servers, which were eligible; however, the server failed the Tennessee Order requirements and is not eligible for Priority One Reimbursement, and is only eligible as a Priority Two Internal Connection. Further, since the Applicant certified that it was eligible for Funding, the Applicant is responsible.
- 2) There was no contract between District 6 and Net56 at the time that the District submitted their FCC Form 471. USAC states in their remand request that the Form 471 was submitted on February 17, 2005, and that the actual contract was not entered into until February 28, 2005.
- 3) USAC claims that there was \$204,000 of free Internet Access-broadband circuits, WAN service, Firewall Service, Email Service and Web Hosting Services provided to District 6 in violation of FCC Rules. USAC claims that the monies granted to the District were utilized to pay for leased equipment, and that no payments were



made by District 6 for the Internet Access Services provided.

- 4) That the remainder of the funding commitments were determined not to be cost effective, and that the applicant failed to select the most cost effective approach, with price being the primary factor.

(See Exhibit A, a copy of the correspondence dated July 12, 2011, attached).

## **II. Statement Of Facts.**

Zion Elementary School District 6 is located in Northern Illinois and is one of the poorest school districts in Illinois. District 6 spending per pupil is far below the Illinois State average, and 75% of the student population comes from low income households. (See Exhibit B). Further, District 6's E-Rate discount rate in 2005 was 82% and, in 2008, District 6 reached the 90% discount rate.

Net56 first contacted District 6 sometime in 2004 with a plan to outsource their entire Information Technology Department. Bill Spakowski, the salesman for Net56 who sold District 6 this technology solution, stated at his discovery deposition that the first time he remembered visiting District 6 was sometime in January of 2005. (See Exhibit C, Page 34). Mr. Spakowski testified that he identified District 6 as a potential sale because it fit a particular sales profile: "Potentially a high E-Rate district that would be able to take advantage of the E-Rate eligible services to provide a better solution for the school district." (See Exhibit C, Pages 70-71)

Mr. Spakowski further testified that he first learned about E-Rate availability to school districts in the fall of 2004. (See Exhibit C, Page 30). In reviewing the eligible service list in USAC, he determined that E-Rate created a sales opportunity for customers whom Net56 had not worked with yet. (See Exhibit C, Page 29). Therefore, Net56 targeted District 6 as it enabled Net56 to sell more services to a District because of their high E-Rate discount. District 6 was the first District Spakowski sold based on this marketing plan. (See Exhibit C, Page 33).

Don Robinson was the assistant superintendent of business for District 6 in 2004 and 2005 but is currently employed by Net56 as an operations manager. (See Exhibit D, Pages 12 and 29). Mr. Robinson lead the evaluation of bids and the selection process for District 6 in 2005. (See Exhibit E, correspondence drafted by Don Robinson dated April 27, 2009). Net56 delivered to District 6 a full quote for their products and services dated January 19, 2005. (See Exhibit F, a copy of the January 19, 2005, quote.). In that document, Net56 claims "Net56 is a(n) eligible service provider therefore providing services for which applicants may seek E-Rate discounts." (See Exhibit F, Page 6). Net56 also outlined a number of ways in which retaining Net56 was "Cost Effective with Immediate Cost Savings." (See Exhibit F, Page 6). This quote further identified a Monthly Service Fee of \$29,095.00, and stated that \$17,000.00 of same met Priority One Reimbursement, with the remainder meeting Priority Two Reimbursements. (See Exhibit F, Page 12). This document demonstrated how Net56 was cost effective in comparison to the District's current environment, with nearly \$200,000.00/year in savings. (See Exhibit F, attachments)

On January 24, 2005, Mr. Robinson reported to the Board of Education on his discussion with Net56. At that time, the Board gave Mr. Robinson authority to go forward with "E-Rate Filing." (See Exhibit G, Board of Education Minutes of January 24, 2005). Accordingly, Mr. Robinson signed a document entitled "Zion School District 6 Internet Access Quote", which was drafted by Net56. The document is dated February 15, 2005 and was signed by both Bruce Koch (the President of Net56) and Mr. Robinson. It provides that Net56 would provide WAN/Internet Access, Firewall, Web Hosting, and Email Local and Web at a monthly cost of \$17,000.00 and a yearly cost of \$204,000.00. It also breaks down the costs associated with the various services. (See Exhibit H, Zion School District 6 Internet Access Quote, attached).

Thereafter, on February 17, 2005, District 6 filed FCC Form 471. Don Robinson again acted with the authority of the School Board in signing this document. The Board of Education thereafter signed and ratified a number of other documents pursuant to the formation of this relationship with Net56 on February 28, 2005. This included contracts and finance agreements. (See Exhibit I.)

On June 28, 2005, USAC wrote to the District requesting information on the DNS/DHCP Server, including certification as to the purpose of the server. The District responded with the proper certifications in response. (See Exhibit J, a copy of the USAC correspondence dated June 28, 2005).

On July 7, 2005, USAC again wrote to District 6 seeking answers to additional questions regarding the DNS/DHCP Server. USAC wrote that the request for funding for the DNS/DHCP Server appeared to be for Internal Connections and requested a configuration diagram. In response, the District provided answers to all questions, as well as the requested diagram, and the funding was allowed. (See Exhibit K, a copy of the July 7, 2005, correspondence).

During 2005, Jerry Steinberg of Telesolutions Consulting, the E-Rate consultant retained by the District at the time, raised some concerns with the way the contract was written, specifically, the arrangement with Millennium Leasing and Net56 and who should be the proper entity invoicing for the services being provided by Net56. This issue became a concern for USAC in later funding years. However, Bill Spakowski, Bruce Koch, and Jerry Steinberg, all had conversations with various individuals at USAC seeking guidance on the contract. They were repeatedly assured that everything was being done appropriately. (See Exhibits L, M and N.)

Between 2005 and 2009, USAC allowed a total of \$755,406.00 in BEAR reimbursements to District 6. Of that money, District 6 was only forwarded funds totaling \$390,320.00. District 6 has litigation pending in Lake County, Illinois requesting, among other things, that the remaining \$365,086.00 be properly returned to the District. (See Exhibit O, a copy of the Amended Complaint at Law). In total, District 6 received four checks from Net56 for "BEAR reimbursements." It is believed that Net56 still holds most if not all monies which were to be paid to the District for Funding Year 2005. On July 17, 2009, Net56 forwarded to District 6, a check in the amount of \$167,280.00 for funding year 2006. (See Exhibit P). On August 12, 2009, Net56 forwarded another statement as a result of two different checks which had been forwarded and totaled \$167,280.00 for funding year 2007. (See Exhibit Q). The fourth check received from Net56 was dated July 5, 2007, and it is unclear as to what this check was to be

used as reimbursement for, except that the memo of the check appears to read "2007-9." (See Exhibit R). The District further believes that these monies were forwarded well past the 20 day requirement set by USAC.<sup>1</sup>

On July 12, 2011, USAC issued its Notification of Commitment Adjustment letter, seeking the return of \$167,280.00 from District 6 for funding year 2005, running from July 1, 2005 to June 30, 2006.

### III. Argument.

#### A. USAC initiated this request beyond the Five Year Administrative Limitations Period set in the FCC's Fifth Report And Order.

The Fifth Order, Released August 13, 2004, at paragraph 31, announces a five year limitations period for actions such as this. The FCC recognized that an administrative limitations period was necessary because it provides applicants and service providers with some certainty of timing, and, therefore, it was in the public interest to set an administrative limitations period. *Fifth Report And Order*. FCC 04-190. Para. 31. (August 13, 2004).

Further, the FCC declined to implement a "full recovery rule" when a pattern of violations is discovered, and instead directed "USAC to conduct more rigorous scrutiny of applications in subsequent funding years when systematic noncompliance of FCC rules is suspected." *Fifth Report And Order*. FCC 04-190. Para. 31.

As a result, the FCC announced and concluded that they will initiate and complete any inquiries to determine whether or not statutory or rule violations exist within a five year period after final delivery of service for a specific funding year. *Fifth Report And Order*. FCC 04-190. Para. 32-3. "We believe that conducting inquiries within five years strikes an appropriate balance between preserving the Commission's fiduciary duty to protect the fund against waste, fraud and abuse and the beneficiaries need for certainty and closure in their E-Rate application process." *Fifth Report And Order*. FCC 04-190. Paragraph 33.

In this case, District 6 was notified on July 12, 2011, of the request for remand of the funds disbursed for Funding Year 2005. The delivery of services for Funding Year 2005, ran from July 1, 2005, to June 30, 2006. Therefore, pursuant to the administrative limitations period set by the FCC in the Fifth Report And Order, the request for remand violated the five year

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<sup>1</sup> Net56 has never forwarded to District 6 the monies that USAC allowed pursuant to the BEAR reimbursements for Funding Year 2005. To make District 6 pay back USAC \$167,280.00 would be patently unfair under these circumstances and cause a huge additional burden to the District. It would be the equivalent of making the District pay twice for the same services.

Of the \$755,406.00 allowed by USAC in BEAR reimbursements over the course of the contract, District 6 only received \$390,320.00. Furthermore, it would appear that the monies forwarded by Net56 were in violation of the 20 business day rule that a service provider has for forwarding BEAR reimbursements. There is currently litigation pending in Lake County, Illinois, State Court over this alleged conversion, as well as other claimed misrepresentations by Net56 to the District, and Net56's alleged breach of a subsequent contract entered into in February 2006. The issues between Net56 and District 6 go far deeper than just this one issue over reimbursements, yet this fact should be considered by USAC prior to seeking any monies in remand from District 6.

administrative limitations period by a period of 12 days. Accordingly, USAC should withdraw their request for remand pursuant to the administrative limitations period. District 6 believes that this issue and argument is dispositive of all issues on review, and that the request for remand should be rescinded. However, District 6 will continue forward and address the remaining issues.

**B. The DNS/DHCP Server Eligibility as Priority One: District 6 relied upon the expertise of Net56 in providing E-Rate eligible equipment and services as well as communications with USAC.**

Based on the District's knowledge and understanding, the DNS/DHCP Server was specifically related to Net56's ability to provide Internet Access to District 6 and it was not used for any ineligible Priority One purpose. Unfortunately, District 6 is incapable of demonstrating the specifications of the 2005 network at this time, as all the equipment which Net56 had been providing in 2005 was removed with the termination of Net56 as District 6's service provider. District 6 did not retain any of this equipment, nor did it ever own any of this equipment. See *The Tennessee Order*. FCC 99-216. Para. 40. (August 11, 1999).

During the time that Net56 was providing IT services to the District, it is the District's understanding that the servers were never used for ineligible purposes. Net56 provided District 6 with an initial Internet Access Quote which specifically line-itemed each and every Priority One service which Net56 was to provide. In this document, under the heading of WAN/Internet Access, Net56 indicated that they would be supplying 1 DNS/DHCP Server for all seven District 6 buildings, and that this equipment would be required for the providing of these services. (See Exhibit H.) These servers were the start point for Net56's delivery of Internet Access Service. (See Exhibit H). See *The Tennessee Order*, FCC 99-216. Para. 38.

District 6 relied upon the information being provided by Net56 regarding which specific technical devices were eligible for E-Rate funding, including the Internet Access Diagram (Exhibit K), and there was nothing on the face of the contracts and quotes from Net56 that indicated that the DNS/DHCP Server was being used in an ineligible manner or for an ineligible purpose.

Furthermore, USAC previously questioned District 6 on the use of the DNS/DHCP Server. USAC advised that the request for funding for the DNS/DHCP Server appeared to be Internal Connections, and requested a configuration diagram so that USAC could make a decision. The District provided the requested diagram and answered all questions posed regarding the use of the Server, after which the funding was allowed (See Exhibits J and K.) District 6 then relied upon these decisions and inquiries made by USAC.

Therefore, the facts demonstrate that the DNS/DHCP Server had been previously investigated, and the District responded appropriately. Further, it is unclear why there has been a reversal in the decision by USAC more than five years after the fact. USAC vetted the issue in 2005, and the District relied upon this vetting. Furthermore, at no time did District 6 own or use the DNS/DHCP Servers for telecommunications services; they were only used to provide Internet access services. *The Tennessee Order*. FCC 99-216. Para. 30.

**C. Net56 and District 6 were involved in a contractual relationship under Illinois law when the Form 471 was filed.**

The FCC requires that applicants have a valid contract as defined by the applicant's state procurement laws and regulations at the time they submit the Form 471. The present facts demonstrate that, indeed, the parties were involved in a valid contract prior to the submission of the Form 471 for Funding Year 2005.

Don Robinson reported to the School Board on his discussions with Net56 on January 24, 2005. At that time, Mr. Robinson was given authority by the Board to proceed with "E-Rate Filing." (See Exhibit G.) Mr. Robinson had the necessary authority to secure a provider, bind the District, and file the required forms necessary to receive E-Rate reimbursements.

On February 15, 2005, Don Robinson signed a document entitled "Zion School District 6 Internet Access Quote." This document was drafted by Net56 and also signed by the President of Net56, Bruce Koch. At that time, the parties had an enforceable contract as to those items that Net56 would be delivering as Priority One eligible services. This document identifies that Net56 would provide WAN/Internet Access, Firewall, Web Hosting, and Email Local and Web and do so at a monthly cost of \$17,000 and a yearly cost of \$204,000.00. This document breaks down the costs associated with each of those various services. (See Exhibit H.). On February 17, 2005, District 6 filed FCC Form 471.

Under Illinois Law, the necessary elements of a contract are an offer, a strictly conforming acceptance to the offer, and supporting consideration. (*Marlin v. Government Employees Insurance Co.* 206 Ill.App.3d 1031 (1970)) In the present case, the Internet Access Quote establishes an offer by Net56 to provide certain Priority One eligible services to District 6 for a definite price, i.e., consideration. Bruce Koch for Net56 and Don Robinson for District 6, both signed this document, demonstrating a strict conforming acceptance of the terms. All the necessary elements were present for the formation of the contract. There is nothing under Illinois State Procurement Laws or Regulations that would suggest that this contract is not valid. Both parties had the authority to enter into this agreement, and the agreement is enforceable under Illinois law.

The agreement signed by Ruth Davis, President of the Board of Education, on February 28, 2005, added additional terms to the prior agreement reached between the parties on February 15, 2005. The February 28<sup>th</sup> document demonstrates that it was drafted on February 9, 2005, prior to the filing of the Form 471 by District 6. The delay in signing the document was only caused by the fact that the next board meeting for District 6 was not until February 28, 2005. (Exhibit I.) At that time, the additional terms of the contract were accepted and signed. However, as of February 15, 2005, Net56 and District 6 had an enforceable agreement.

**D. District 6 did not receive free services in their Contract with Net56, and paid all monies required under the contract.**

District 6 did not receive "free services" from Net56. This is demonstrated by the two contract documents. First, Net56 and District 6 entered into an agreement summarized by the February 15, 2005 Internet Access Quote. This document outlines specific services, all eligible

for Priority One Funding, and states a monthly cost of \$17,000.00 and a yearly cost of \$204,000.00. (Exhibit H). Additionally, District 6 previously provided the second executed agreement of February 28, 2005. (Exhibit I). This document itemizes a monthly cost of \$30,830.12. Of this \$30,830.12, the parties understood the agreement to mean that the amount of \$17,000 was for monthly priority one E-Rate services. This is further supported by the Net56 proposal of January 19, 2005 which includes the Priority One and Priority Two Breakdown. (Exhibit F) There is no contention by any party that District 6 did not pay this monthly amount. In fact, District 6 made each and every payment under the terms of the agreement.

Furthermore, the February 15, 2005 contact identified the Priority One eligible services provided: WAN/Internet Access, Firewall, Web Hosting, and Email Local and Web. These services are further itemized based on various components that were required to provide those services. These itemizations demonstrate compliance with USAC requirements to receive E-Rate funding. Therefore, District 6 did not receive any free services and made all payments under both agreements.

**E. District 6 believed that at the time of entering into the Contract with Net56, that the agreement was indeed cost-effective.**

At this time, it is difficult to reconstruct all of the various reasons that resulted in District 6's IT needs being completely outsourced to Net56; however, the District does have correspondence from Don Robinson, a current employee of Net56, that outlines his reasons for going with Net56 at the time. (Exhibit E). He provided some comparison documents for Web and E-Mail Hosting and demonstrated a savings of \$19,000. Further, Net56 was more cost-effective compared to two other providers, Microsoft and 123 Together. Additionally, Net56 provided the cheapest for Firewall Service when compared to four other providers. (See attachments to Exhibit E).

The FCC has stated, "We recognize that all service providers include within their prices to customers some amount of the cost of building facilities to provide the service. Indeed, by way of analogy, we have allowed common carriers to include within their rates to customers, some amount of the cost of the facilities used to provide such services to customers." *The Tennessee Order*, FCC 99-216. Para. 29 (August 11, 1999). Therefore, it must be assumed that the analysis that USAC used in determining cost-effectiveness was improperly stringent.

The record demonstrates that the cost of the Net56 solution was taken into account, and it was compared to other providers. Furthermore, the cost and potential cost savings for the District appears to be the only reason why Net56 was ultimately contracted with by District 6. Don Robinson felt that outsourcing was the only available option to upgrading the District's "poor state of technology" at the time. (See Exhibit E, Page 2). As stated earlier, District 6 is a relatively poor district and could not have afforded any other solution except one that was cost-effective.

District 6 did take into account the cost of the services which were being provided and attempted to make a well informed decision as to the cost-effectiveness of the Net56 Solution. Additionally, USAC never raised any prior concern as to the cost-effectiveness of the solution

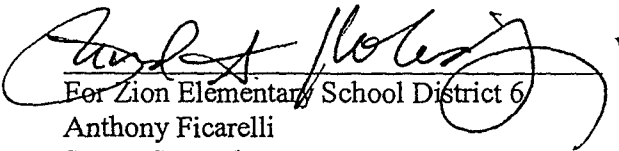
until the final year of the contract, and it provided funding for the previous years. This is not a situation where there is evidence of abuse or fraud on the part of District 6.

#### **IV. Conclusion And Prayer For Relief.**

Zion Elementary School District 6 requests that USAC overturn the request for remand of all funds disbursed for Funding Year 2005 (July 1, 2005 – June 30, 2006) which was received on July 12, 2011. First and most importantly, the administrative statute of limitations period, set by the FCC in *The Fifth Report And Order*, expired on June 30, 2011. Further, District 6 relied upon the claimed expertise of Net56 in providing E-Rate eligible equipment and services and on additional representations made by USAC. District 6 has further demonstrated a contractual relationship was present prior to the filing of Form 471. District 6 received no "free" services and has demonstrated same with the documents submitted. District 6 additionally attempted to implement a cost-effective strategy in selecting Net56.

District 6 services a low income community and attempted to follow each and every rule and regulation of USAC and the E-Rate process. In contracting with Net56 in 2005, District 6 attempted to provide a better educational environment for its students. Indeed, the E-rate program was designed for school districts just like District 6 to provide better access to the Internet for their students. District 6 respectfully requests that the decision be overturned for the reasons stated and argued above.

Respectfully Submitted,



For Zion Elementary School District 6

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Enclosures

cc: Net56, Inc.





# HINSHAW

& CULBERTSON LLP

## LETTER OF APPEAL

April 4, 2012

Letter of Appeal  
Schools and Libraries Division – Correspondence Unit  
30 Lanidex Plaza West  
P.O. Box 685  
Parsippany, NJ 07054-0685

### ATTORNEYS AT LAW

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Re: **REQUEST FOR COMBINED REVIEW.** In The Matter of Notification of Improperly Disbursed Funds Recovery Letter. Funding Year 2006: July 1, 2006 – June 30, 2007. FRN 1454858; and, The Matter of Notification of Improperly Disbursed Funds Recovery Letter. Funding Year 2007: July 1, 2007 – June 30, 2008. FRN's 1581838, 1581853, 1576788, 1581790, 1581809; and, The Matter of Notification of Improperly Disbursed Funds Recovery Letter. Funding Year 2008: July 1, 2008 – June 30, 2009. FRN 1755420.

Appeal of Commitment Adjustment Decisions  
CC Docket No. 02-6; Docket No. 96-45  
Applicant Name: Zion Elementary School District 6  
Billed Entity Name: Zion Elementary School District 6  
Contact Persons: Anthony Ficarelli  
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Combined Request to Appeal From: Notification of Commitment Adjustment Letters,  
Dated 2/8/12

Billed Entity Number: 135356  
FRN's: 1454858, 1581838, 1581853, 1576788, 1581790, 1581809, 1755420  
Form 471 Numbers: 527649, 571023, 634543  
Date of Notification of Commitment Adjustment Letter: February 8, 2012.  
Funds to be recovered: \$194,220.00, \$285,906.00, and \$108,000.

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Zion Elementary School District 6, by their attorneys, Hinshaw & Culbertson, LLP, appeals the Notification of Commitment Adjustment letters dated February 8, 2012 for Funding Year 2006: July 1, 2006 - June 30, 2007, Funding Year 2007: July 1, 2007 - June 30, 2008, Funding Year 2008: July 1, 2008 - June 30, 2009. .

#### **I. SUMMARY OF ISSUES ON REVIEW.**

On or about February 8, 2012, Zion Elementary School District 6, (hereinafter District 6) was served with correspondence entitled: "Notification of Improperly Disbursed Funds Recovery Letter. Funding Year 2006: July 1, 2006 - June 30, 2007," "Notification of Improperly Disbursed Funds Recovery Letter. Funding Year 2007: July 1, 2007 - June 30, 2008," and "Notification of Improperly Disbursed Funds Recovery Letter. Funding Year 2008: July 1, 2008 - June 30, 2009," Copies of these letters were also sent to District 6's service provider at the time, Net56, Inc. (hereinafter, Net56). In total, USAC is seeking the return of \$194,220.00 for Funding Year 2006, \$285,906.00 for Funding Year 2007, and \$108,000.00 for Funding Year 2008, which USAC claims to have been improperly disbursed. (See Group Exhibit A, a copy of all USAC letters received by the District dated February 8, 2012, attached).

District 6 will address only those allegations which have been raised against the District and will allow Net56 to respond to any allegations directed towards it. It should be noted, District 6 is currently involved in litigation with Net56 in the Circuit Court of Lake County. Included in this litigation is a request for Net56 to return approximately \$365,000 in BEAR reimbursements which have been improperly withheld. District 6 paid the full amount of their contract price, yet District 6 has never received all of the reimbursement for Funding Years 2006, 2007 and there are substantial questions regarding Funding Year 2008. To make the District pay an additional \$588,126.00 would result in the District being charged twice for the same services and would further hinder the underlying policy of E-Rate funding. A copy of this request for review has been forwarded to counsel for District 6's former provider, Net56.

USAC cites the following basis for their request for remand, each of which will be addressed in detail below, establishing that District 6 acted appropriately in every instance:

1)	For Funding Years 2006, 2007, and 2008, USAC claims that all monies dispersed were for free Internet Access-WAN Service, and that all monies were paid for the leasing of equipment under the Contract.
2)	That the remainder of the funding commitments were determined not to be cost effective, and that the applicant failed to select the most cost effective approach, with price being the primary factor.

(Exhibit A.)

## **II. STATEMENT OF FACTS.**

### **A. Background Facts**

Zion Elementary School District 6 is located in Northern Illinois and is one of the poorest school districts in Illinois. District 6 spending per pupil is far below the Illinois State average, and 75% of the student population comes from low income households. (See Exhibit B). Further, District 6's E-Rate discount rate in 2005 was 82% and, in 2008, District 6 reached the 90% discount rate.

#### **1. The Formation Of The Contract Between Net56 and District 6.**

Net56 first contacted District 6 sometime in 2004 with a plan to outsource their entire Information Technology Department. William Spakowski, the salesman for Net56 who sold District 6 this technology solution, stated at his discovery deposition that the first time he remembered visiting District 6 was sometime in January of 2005. (See Exhibit C, Page 34). Mr. Spakowski testified that he identified District 6 as a potential sale because it fit a particular sales profile: "Potentially a high E-Rate district that would be able to take advantage of the E-Rate eligible services to provide a better solution for the school district." (See Exhibit C, Pages 70-71)

Mr. Spakowski further testified that he first learned about E-Rate availability to school districts in the fall of 2004. (See Exhibit C, Page 30). In reviewing the eligible service list in USAC, he determined that E-Rate created a sales opportunity for customers whom Net56 had not worked with yet. (See Exhibit C, Page 29). Therefore, Net56 targeted District 6 as it enabled Net56 to sell more services to a District because of their high E-Rate discount. District 6 was the first District Spakowski sold based on this business model. (See Exhibit C, Page 33).

Don Robinson was the assistant superintendent of business for District 6 in 2004 and 2005 but is currently employed by Net56 as an operations manager. (See Exhibit D, Pages 12 and 29). Mr. Robinson lead the evaluation of bids and the selection process for District 6 in 2005. (See Exhibit E, correspondence drafted by Don Robinson dated April 27, 2009). Net56 delivered to District 6 a full quote for their products and services dated January 19, 2005. (See Exhibit F, a copy of the January 19, 2005, quote.). In that document, Net56 claims "Net56 is a(n) eligible service provider therefore providing services for which applicants may seek E-Rate discounts." (See Exhibit F, Page 6). Net56 also outlined a number of ways in which retaining Net56 was "Cost Effective with Immediate Cost Savings." (See Exhibit F, Page 6).

As a result of these discussions, District 6 retained Net56 and entered into a contract for services in February of 2005. At that time, a lease-financing agreement was also executed by District 6. Net56 sold their contract with District 6 to a financing company which would invoice the District and the District would pay a monthly fee of approximately \$30,000.00. (See Exhibit G). Therefore, the parties were operating under the BEAR method of reimbursement.

## **2. Receipt of E-Rate Funding From USAC and Net56.**

Attached to this correspondence are invoice statements and copies of the canceled checks that correspond to those invoices dated from August of 2006 through December of 2008. (See Exhibits I and J, attached.) These documents demonstrate that District 6 was making all payments required of them under the contract in a monthly lump sum amount. Unfortunately, these are the only documents which still exist at this time.

Furthermore, attached to this correspondence are Internet Access Quotes for Funding Years 2005, 2006, and 2007. These documents demonstrate the portions of those monies that were attributed to Priority One Funding requests under FRN's 1454858, 1581838, 1581853, 1576788, 1581790 and 1581809. (See Exhibits K, L, and M).

Between 2005 and 2009, USAC allowed a total of \$755,406.00 in BEAR reimbursements to District 6. Of that money, District 6 was only forwarded funds totaling \$390,320.00. District 6 has litigation pending in Lake County, Illinois requesting, among other things, that the remaining \$365,086.00 be properly returned to the District. (See Exhibit N, a copy of the Amended Complaint at Law). In total, District 6 received four checks from Net56 for "BEAR reimbursements." On July 17, 2009, Net56 forwarded to District 6, a check in the amount of \$167,280.00 for funding year 2006. (See Exhibit O). On August 12, 2009, Net56 forwarded another statement as a result of two different checks which had been forwarded and totaled \$167,280.00 for funding year 2007. (See Exhibit O). No monies were ever forwarded to District 6 for Funding Year 2008.

In February of 2010, USAC denied all funding requests related to Net56 for Funding Year 2008 except for FRN 1755420. USAC also denied all funding requests related to Net56 for Funding Year 2009. District 6 did not file appeals regarding these denials. (See Exhibits P and Q, Attached).

On July 12, 2011, USAC issued its First Notification of Commitment Adjustment letter, seeking the return of \$167,280.00 from District 6 for funding year 2005, running from July 1, 2005 to June 30, 2006. District 6 has filed an appeal regarding this request.

On February 8, 2011, USAC issued First Notification of Commitment Adjustment letters for the remaining Funding Years of 2006, 2007 and 2008. (Exhibit A).

**B. Funding Year 2006**

**1. A Review of the Contract Price For Funding Year 2006 And Services Received.**

District 6 has provided evidence of paying approximately \$30,000 per month throughout Funding Year 2006. Therefore, District 6 paid in excess of \$360,000.00 in the 2006 Funding Year to Net56. (Exhibits I & J).

Further, District 6 has attached the Internet Access Quote for Funding Year 2006. This document shows that District 6 was paying \$17,000/month or \$204,000/year for that portion of the Agreement that related to Priority One E-Rate Services. (Exhibit L). This demonstrates that portion of the contract which was not for the leasing of equipment but monies which actually paid for Priority One E-Rate Services.

**2. Monies Received by District 6 for Funding Year 2006.**

Based on a review of the USAC website, we now know that monies were forward to Net56 in the amount of \$194,220.00, and that all of these monies were received by Net56 between approximately February 20, 2007, and July 9, 2007. Net56 sent a check to District 6 for \$167,280.00, which would confirm that the parties were involved in a BEAR reimbursement agreement. This check was sent to the District in July of 2009. Therefore, Net56 waited more than two years before sending these monies to the District in violation of program and USAC rules, specifically that monies received are to be forwarded to the District within 20 days. (See Exhibit J, a copy of the check received from Net56). Furthermore, Net56 has no explanation for retaining the balance of \$26,940.00, to this day.

**C. Funding Year 2007**

**1. A Review Of The Contract Price for Funding Year 2007 And Services Received.**

District 6 has provided evidence of paying approximately \$30,000 per month throughout Funding Year 2007. Therefore, District 6 paid in excess of \$360,000.00 in the 2007 Funding Year to Net56. (Exhibits I & J).

Further, District 6 has attached the Internet Access Quote for Funding Year 2007. This document shows that District 6 was paying \$28,000/month; however, \$10,000 of this amount was going for a "100 MB pipe" which is discussed below. If we remove that amount of money from the Internet Access Quote, District 6 was paying \$18,000.00/month or \$216,000/year for that portion of the Agreement that related to Priority One E-Rate Services. (Exhibit M). This demonstrates that portion of the contract which was not for the leasing of equipment but monies which actually paid for Priority One E-Rate Services.

## **2. The 100 MB Pipe.**

In 2007, through discovery produced in the Civil Litigation, District 6 has learned that FRN 1576788 has been claimed by Net56 to be for a 100 MB pipe which they first began to provide in Funding Year 2007. A document has been produced by Net56 that demonstrates in 2007 that Rick Terhune, a former business manager for District 6, signed off on an "Internet Access Quote" created by Net56. (See Exhibit M, attached) In that document, as compared to the previous Internet Access Quote for Funding Year 2006, it demonstrates an additional expense of \$10,000.00/month or \$120,000.00 for the year for a "100 MB Curit between Net56 & Zion Elementary District 6 w/ Guarantee 100 MB internet access."

While this document was signed by the Business Manager, Rick Terhune, the addition of \$120,000.00/year to Net56 under the previous contract, this addition was never brought before the Board of Education. However, Net56 also did not at any point invoice District 6 for the additional expense of \$120,000/year. Net56 never even invoiced District 6 the discounted portion of the 100 MB pipe. Furthermore, Mr. Terhune testified at deposition he believed that he was authorized to sign off on this document because William Spakowski of Net56 told him that it would cost the District nothing. (See Exhibit H attached, a portion Of Rick Terhune's Deposition, pages 126-128 and pages 129-130).

The only evidence received by District 6 in their litigation with Net56 regarding the providing of the 100 MB pipe are slides from a PowerPoint presentation. (See Exhibit R, attached). No where in this document provided by Net56 is there a suggestion that the District needs to increase the size of the pipe running to the District. Furthermore, reviewing the Internet Access Quote for Funding Year 2006 demonstrates that District 6 had access for \$7,000.00/month to a 4.5 MB internet access which was "burstable" to 100 MB under the heading of Internet Access, and for Funding Year 2007, there was a new heading for "WAN Service for Internet Access" which was not on the 2006 Funding Year document which was for \$7,565.00/month. (See Exhibits L and M).

Finally, Net56 attempted to enter into a new contract with District 6 in 2010, and in their proposal Net56 proposed a "4.5 MB internet access while the third year is for 100 MB access." This would seem to indicate that the District did not even need the 100 MB pipe as of January of 2010 and it was not expected to need the pipe until Funding Year 2012. (Exhibit S, a copy of an E-Mail from Don Robinson dated January 14, 2010).

## **3. Monies Received by District 6 for Funding Year 2007.**

Based on a review of the USAC website, we now know that monies were forward to Net56 in the amount of \$285,906.00, and that all of these monies were received by Net56 between approximately March 20, 2008, and July 25, 2008. Net56 sent two checks to District 6 totalling \$167,280.00, which would confirm that the parties were involved in a BEAR reimbursement agreement. Both of these checks were sent in August of 2009. Therefore, while Net56 still retained \$118,626.00 of the reimbursements received, Net56 also waited more than a year before sending these monies to the District

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in violation of program and USAC rules, specifically that monies received are to be forwarded to the District within 20 days. (See Exhibit O, a copy of the checks received from Net56).

Net56 has claimed in their litigation that a portion of this money, the portion paid under FRN 1576788 for the 100 MB pipe, was paid under a SPI arrangement, and therefore, Net56 has the right to retain this \$102,000.00 for full payment of those services. However, Net56 has no explanation as to why they have retained to this day the balance of \$16,626.00, and further has never produced a single invoice showing that they ever Billed District 6 the discounted portion of the monies paid for the 100 MB pipe, nor has Net56 provided any proofs to the District of having provided this service to the District.

#### **D. Funding Year 2008**

The sole funding awarded in Funding Year 2008, was under FRN 1755420. All other funding requests for funding year 2008 were denied by USAC. The FRN at issue is declared to be for "Internet Access." The monies paid were again for the "100 MB pipe" or so Net56 claims.

In reviewing discovery that has been produced in the Civil Litigation, it is clear that this request was paid at the request of Net56, as other funding requests were being reviewed by USAC. An e-mail was sent by William Spakowski of Net56 asking for this FRN to be paid on February 23, 2009, despite the ongoing review process. (See Exhibit T, a copy of which is attached.).

As reviewed above in the section regarding Funding Year 2007, this FRN request appears to be for the 100 MB pipe that Net56 at no point in time had board approval to provide, nor did Net56 at any point in time invoice District 6 for this service. It is unclear in retrospect if Net56 was even providing this service. However in 2009, Net56 made a proposal to the District to stay on as their provider of IT services and in that proposal stated that they would provide a 4.5 MB burstable to 100 MB for the first two years of the agreement, and then upgrade to a 100 MB pipe. (Exhibit S).

What is clear from the review of the facts is that Net56 has never forwarded this money to District 6. Net56 has retained the \$108,000.00, and has never invoiced the District for the Discounted Portion nor produce an invoice or other proof of the service being provided.

### **III. ARGUMENT.**

District 6 contends that by reviewing the facts as presented, the District was never receiving free services from Net56. In fact, District 6 was paying more than \$360,000.00/year for the services provided by Net56. This included monies that were allowable for Priority One Services under E-Rate as well as services which were not. Additionally, the sole purpose for District 6 to enter into this relationship was based on

the fact that the product was Billed as being Cost Effective. Therefore, the requests by USAC should be overturned as to the District.

**A. District 6 Did Not Receive Free Services In Their Contract With-Net56, And Paid All Monies Required Under The Contract.**

District 6 did not receive "free services" from Net56. This is demonstrated by the two contract documents. First, District 6 has provided the Internet Access Quotes for 2005, 2006 and 2007. These documents outline specific Priority One Services and identify their individual costs. (Exhibits K, L and M). Additionally, District 6 previously provided the contract agreement of February 2005. (Exhibit G). This document itemizes a monthly cost of \$30,830.12. Of this \$30,830.12, the parties understood the agreement to mean that the amount indicated in the Internet Access Quote was for monthly Priority One E-Rate services. This is further supported by the Net56 proposal of January 19, 2005 which includes the Priority One and Priority Two Breakdown. (Exhibit F) There is no contention by any party that District 6 did not pay this monthly amount. In fact, District 6 made each and every payment under the terms of the agreement and has provided proof. (Exhibits I & J).

Furthermore, the Internet Access Quotes identified the Priority One eligible services: WAN/Internet Access, Firewall, Web Hosting, and Email Local and Web. These services are further itemized based on various components that were required to provide those services. These itemizations demonstrate compliance with USAC requirements to receive E-Rate funding. Therefore, District 6 did not receive any free services and made all payments under the agreement.

**B. District 6 Believed That At The Time Of Contracting with Net56, That The Agreement Was Cost-Effective.**

At this time, it is difficult to reconstruct all of the various reasons that resulted in District 6's IT needs being completely outsourced to Net56; however, the District does have correspondence from Don Robinson, a current employee of Net56, that outlines his reasons for going with Net56 at the time. (Exhibit E). He provided some comparison documents for Web and E-Mail Hosting and demonstrated a savings of \$19,000. Further, Net56 was more cost-effective compared to two other providers, Microsoft and 123 Together. Additionally, Net56 provided the cheapest for Firewall Service when compared to four other providers. (See attachments to Exhibit E).

The FCC has stated, "We recognize that all service providers include within their prices to customers some amount of the cost of building facilities to provide the service. Indeed, by way of analogy, we have allowed common carriers to include within their rates to customers, some amount of the cost of the facilities used to provide such services to customers." *The Tennessee Order*, FCC 99-216. Para. 29 (August 11, 1999). Therefore, it must be assumed that the analysis that USAC used in determining cost-effectiveness was improperly stringent.



The record demonstrates that the cost of the Net56 solution was taken into account, and it was compared to other providers. Furthermore, the cost and potential cost savings for the District appears to be the only reason why Net56 was ultimately contracted with by District 6. Don Robinson felt that outsourcing was the only available option to upgrading the District's "poor state of technology" at the time. (See Exhibit E, Page 2). As stated earlier, District 6 is a relatively poor district and could not have afforded any other solution except one that was cost-effective.

Furthermore, Net56 provided documentation to District 6 demonstrating how the Net56 solution was the most cost effective choice. (See Exhibit F). As stated in the March 19, 2012 Order of the FCC, File Nos. SLD-459333, et al., CC Docket No. 02-6, the cost effectiveness of a funding request is dependent on the District's circumstances. In the present case, Net56 demonstrated how their product was cost effective when compared to what the District had previously in place. (See Exhibit F).

District 6 did take into account the cost of the services which were being provided and attempted to make a well informed decision as to the cost-effectiveness of the Net56 Solution. Additionally, USAC never raised any prior concern as to the cost-effectiveness of the solution until the final year of the contract, and it provided funding for the previous years. This is not a situation where there is evidence of abuse or fraud on the part of District 6.

Furthermore, we can review other Districts Form 471 filings which demonstrate that the funds that District 6 was seeking, were similar to other Districts. This establishes a consistency in cost which demonstrates cost effectiveness.

A look at Funding Year 2006 demonstrates that Deerfield School District 109's Form 471 filings for Internet Access was \$29,150.00/month. Lincolnwood School District 74's Form 471 filings for Internet Acces was \$20,270.00/month. Country Club Hills School District 160 was seeking \$24,260.00/month. Finally, Community Unit School District 220 was seeking \$27,170.00/month for the same services. This demonstrates that the amount that Zion Elementary School District 6 was seeking for reimbursement for Internet Access, \$19,500.00/month, was not an unreasonable amount. In fact, the request is lower than any of the other identified districts being serviced by Net56. (See Exhibit U)

Funding Year 2007 demonstrates similar consistencies. District 6 sought funding for Internet Access in the amount of \$30,530.00/month. Comparatively, Oak Park Elementary School District 97 sought funding for expenditures of \$29,480.00/month; Country Club Hills School District 160 sought funding for expenditures of \$24,260.00; Deerfield School District 109 sought funding for expenditures of \$29,249.15/month; Lincolnwood School District 74 sought funding for expenditures of \$20,319.75/month; Round Lake Area School District 116 sought funding for expenditures of \$47,890.00/month; Wheeling School District 21 sought funding for expenditures of \$60,816.00; and finally Oak Park Elementary School District 97 sought funding for expenditures of \$102,160.00/month for Internet Access. (See Exhibit V).